No. 13-4079

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT

AMERICAN FARM BUREAU FEDERATION, *et al*.,

Plaintiffs-Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al*.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
Case No. 11-cv-00067 (Hon. Sylvia H. Rambo)

BRIEF OF 39 BIPARTISAN MEMBERS OF CONGRESS AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS, URGING REVERSAL

Cory L. Andrews
Richard A. Samp
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., N.W.
Washington, DC 20036
(202) 588-0302

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Washington Legal Foundation (WLF) states that it is a non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, does not issue stock, and no publicly held company holds a 10% or greater ownership interest.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

Page(s)

STATUTES:

OTHER AUTHORITIES:

IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Congressional *amici* are a bipartisan group of Members of Congress with a strong interest in seeing that federal statutes are properly interpreted and implemented, and that courts apply *Chevron* deference in a manner that adheres to the Constitution's separation of powers among Congress, the Executive, and the Judiciary. Because the outcome of this appeal hinges on the Court's use of the *Chevron* doctrine to discern Congress's meaning in enacting the Clean Water Act (CWA), the views of Congressional *amici* are especially relevant. In particular, Congressional *amici* have a clear interest in ensuring that Congress's supreme legislative and policy-making role is not usurped by unelected Executive Branch agencies.

Congressional *amici* include **Rep. Bob Goodlatte**, Chairman of the House Committee on the Judiciary, from Virginia's 6th Congressional District; **Rep. Frank Lucas**, Chairman of the House Committee on Agriculture, from Oklahoma's 3rd Congressional District; **Rep. Collin Peterson**, Ranking Member of the House Committee on Agriculture, from Minnesota's 7th Congressional District; **Rep. Kevin Brady**, Chairman of the Joint Economic Committee, from

[1] Pursuant to Federal Rule of Appellate Procedure 29(c), *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

Texas's 8th Congressional District; **Rep. Sam Graves**, Chairman of the House Committee on Small Business, from Missouri's 6th Congressional District; **Rep. Bill Shuster**, Chairman of the House Committee on Transportation and Infrastructure (which committee has jurisdiction over the Clean Water Act), from Pennsylvania's 9th Congressional District; **Rep. Joe Barton** from Texas's 6th Congressional District; **Rep. Robert Aderholt** from Alabama's 4th Congressional District; **Rep. Marsha Blackburn**, Vice Chairman of the House Energy and Commerce Committee, from Tennessee's 7th Congressional District; **Rep. Randy Neugebauer** from Texas's 19th Congressional District; **Rep. Louie Gohmert** from Texas's 1st Congressional District; **Rep. Adrian Smith** from Nebraska's 3rd Congressional District; **Rep. John Fleming** from Louisiana's 4th Congressional District; **Rep. Brett Guthrie** from Kentucky's 2nd Congressional District; **Rep. Blaine Luetkemeyer** from Missouri's 3rd Congressional District; **Rep. Kurt Schrader** from Oregon's 5th Congressional District; **Rep. Glenn Thompson** from Pennsylvania's 5th Congressional District; **Rep. Lou Barletta** from Pennsylvania's 11th Congressional District; **Rep. Scott DesJarlais** from Tennessee's 4th Congressional District; **Rep. Jeff Duncan** from South Carolina's 3rd Congressional District; **Rep. Bob Gibbs**, Chairman of the Water Resources and Environment Subcommittee (which has jurisdiction over the Clean Water Act), from Ohio's 7th Congressional District; **Rep. Morgan Griffith** from Virginia's

9th Congressional District; **Rep. Andy Harris** from Maryland's 1st Congressional District; **Rep. Vicky Hartzler** from Missouri's 4th Congressional District; **Rep. Tim Huelskamp** from Kansas's 1st Congressional District; **Rep. Robert Hurt** from Virginia's 5th Congressional District; **Rep. Billy Long** from Missouri's 7th Congressional District; **Rep. David McKinley** from West Virginia's 1st Congressional District; **Rep. Mike Pompeo** from Kansas's 4th Congressional District; **Rep. Todd Rokita** from Indiana's 4th Congressional District; **Rep. Dennis A. Ross** from Florida's 15th Congressional District; **Rep. Scott Tipton** from Colorado's 3rd Congressional District; **Rep. Thomas Massie** from Kentucky's 4th Congressional District; **Rep. Chris Collins** from New York's 27th Congressional District; **Rep. Doug Collins** from Georgia's 9th Congressional District; **Rep. Scott Perry** from Pennsylvania's 4th Congressional District; **Rep. Robert Pittenger** from North Carolina's 9th Congressional District; **Senator David Vitter**, Ranking Member for the Senate Environment and Public Works Committee (which committee has jurisdiction over the Clean Water Act), from Louisiana; and **Senator Pat Toomey** from Pennsylvania.

In addition to their institutional interest, Congressional *amici* also have a profound interest on behalf of their constituents in helping to ensure the proper interpretation of federal law, especially when—as in this case and those that may follow in its precedential wake—federal regulatory action threatens to impose

enormous burdens on their constituents' pocketbooks and economic freedoms.[2] Based on state and independent cost analyses, the Chesapeake Bay TMDL places an immense financial burden on the many constituents, industries, and States who will be directly impacted by its implementation. For example, the University of Maryland's School of Public Policy has estimated that it will cost a combined $50 billion between 2010 and 2025 to achieve the incremental improvements called for under the TMDL in Virginia, Maryland, Pennsylvania, Delaware, West Virginia, and New York. *See* Robert Nelson, *Saving the Chesapeake Bay TMDL: The Critical Role of Nutrient Offsets*, Md. Sch. Pub. Pol'y, Oct. 2012, at 40.[3] How the burdens and responsibilities of achieving these goals are allocated and adjusted among sources and sectors such as agriculture, forest landowners, homeowners,

[2] Notably, EPA refused to consider the economic costs and impacts of its actions in establishing the Chesapeake Bay TMDL. *See* 76 Fed. Reg. 549 (Jan. 5, 2011).

[3] At the individual State level, Virginia's Senate Finance Committee estimates that TMDL compliance will cost $13.6 billion to $15.7 billion. *See* Va. Senate Fin. Comm., Chesapeake Bay TMDL Watershed Implementation Plan, 2011 Sess., at 17. Similarly, Maryland's Watershed Implementation Plan estimates that the State will need to exhaust $14.40 billion to reach the nutrient levels mandated by the TMDL. *See* Md. Dep't of Env't, Maryland's Phase II Watershed Implementation Plan for the Chesapeake Bay TMDL, Oct. 2012, at 55. The University of Maryland study also estimates that TMDL implementation will cost Pennsylvania about $15 billion. *See* Nelson, *supra*, at 39. Private landowners, businesses, and residents will bear a significant portion of the cost of TMDL implementation, not only because the affected States do not have enough funding on hand to cover the future expenses, but because they themselves must expend funds or forgo economic activity and, ultimately, are the source of state and local funds as taxpayers. *Id.* at 40.

municipalities, builders, and developers is the quintessential responsibility of state and local authorities.

If allowed to stand, the decision below would allow EPA to usurp this traditional state authority over economic development and land-use management decisions, locking in source and sector-specific allocations and robbing the States of the freedom and flexibility to adapt their own plans based on new technologies, changing circumstances, or economic efficiencies. *See* Nelson, supra, at 40 (regarding potential for reallocation of pollutant reductions to more cost-effectively achieve TMDL goals). Hamstringing the States in this way runs directly counter to the CWA's venerable policy of cooperative federalism. This approach is especially disturbing given EPA's lack of accountability to state and local voters who will be most directly affected by the land-use changes, regulatory requirements, and development restrictions necessary to implement the Chesapeake Bay TMDL. *Amici* strongly believe that the Chesapeake Bay TMDL unduly restricts state and local land use authority and economic freedom by locking in federally mandated allocations instead of allowing the affected States the flexibility to adopt and adapt their own restoration plans.

The **Washington Legal Foundation** (WLF) is a public interest law firm and policy center with supporters in all 50 States. WLF regularly appears as *amicus curiae* before federal and state courts to promote economic liberty, free enterprise,

a limited, accountable government, and the rule of law. To that end, WLF routinely litigates in regulatory cases to ensure that undue deference is not accorded to federal regulatory agencies. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Pharm. Research & Mfrs. of Am. v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004).

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal centers on defining the proper scope of EPA's authority to establish TMDLs under the Clean Water Act (CWA). Section 303(d) of the CWA authorizes EPA simply to establish a single total maximum daily load at a level necessary to meet applicable water quality standards. In contrast, the Chesapeake Bay TMDL at issue in this case goes far beyond that delegated authority by allocating pollutant limits to specific sources, requiring states to give reasonable assurances as to how they will meet those individually allocated limits, and imposing deadlines for accomplishing the goals of the TMDL. Nothing in the CWA grants EPA such sweeping authority. In exceeding its statutory authority, EPA usurps state and local power to decide how to achieve TMDL limits and ignores the cooperative federalism framework Congress provided to govern EPA's regulatory implementation of the CWA.

The district court allowed this improper expansion of regulatory power through a flawed application of the *Chevron* doctrine. In finding the CWA insufficiently clear on the scope of EPA's authority regarding TMDLs, the district court seized *on the absence of an express prohibition* of EPA's actions as a basis for proceeding to *Chevron* step two and upholding those actions. The district court should have rejected EPA's interpretation at *Chevron's* first step because the plain language of the CWA reveals that Congress never gave EPA power to impose

binding pollutant allocations in a TMDL. Rather, Congress authorized EPA to establish nothing more than a "total maximum daily load" necessary to ensure water quality. No language in the statute comes anywhere close to giving EPA authority to allocate portions of that load to specific sources, require reasonable assurance from states, or impose deadlines. In fact, Congress exclusively used the singular form for the terms "total," "load," and "level," which further proves that Congress intended EPA to establish only one aggregate TMDL. This interpretation also comports with Congress's careful cooperative federalism scheme under the CWA, which requires that EPA respect state and local land use decisions.

Despite this unambiguous congressional design, the district court improperly used the *lack of an express statutory prohibition* against EPA's claimed interpretation as a basis for moving to step two of *Chevron's* separation of powers calculus. But the mere absence of a prohibition, standing alone, does not create ambiguity under *Chevron*. The district court's flawed approach thus fails to accomplish the *Chevron* framework's purpose of preventing executive agencies from assuming Congress's policy-making role through undue expansion of regulatory power. If the district court's analysis is affirmed, agencies will easily be able to find ambiguities in nearly every statute.

Agencies should not be allowed to seize virtually limitless power by simply positing an expansive statutory interpretation that is not expressly prohibited. Such

an approach unfairly asks Congress to anticipate every possible contrary interpretation an agency could conceive in the future. Congress does not and could not write statutes that way, and Congressional *amici* fear they all too often could not draft statutes that would survive *Chevron* step one if the district court's holding is affirmed. This court has rejected such an approach in the past and should do so here to preserve appropriate separation of powers between the legislative and executive branches.

ARGUMENT

I. The *Chevron* Framework Embodies Separation-of-Powers Concerns

In the seminal case of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court cautioned that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Id.* at 866. The Court went on to emphasize that "[t]he responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Id.* Rather, "[o]ur Constitution vests such responsibilities in the political branches." *Id.* (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

Mindful of the separation of powers, then, the *Chevron* Court established a two-step framework for reviewing an agency's interpretation of a statute that it administers. In crafting that framework, the *Chevron* Court "relied on basic

principles of democratic government: Policy choices are for the political branches, and Congress is the Supreme branch for making such choices." *Miss. Poultry Ass'n, Inc. v. Madigan*, 31 F.3d 293, 299 (5th Cir. 1994) (*en banc*).

Under *Chevron* step one, courts must use "traditional tools of statutory construction" to determine whether Congress's intent is clear on the question at issue. *Chevron*, 467 U.S. at 843 & n.9. If Congress's intent is clear, "that is the end of the matter" and both the court, as well as the agency, "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. This approach reinforces Congress's unique role in making policy choices by giving primacy to those choices.

Likewise, step two of the *Chevron* analysis helps to preserve the separation of powers among the legislative, executive, and judicial branches. Step two applies only where "the court determines that Congress has not directly addressed the precise question at issue," *and* that Congress has delegated authority to address the issue to the agency. *Id.* at 843. If, but only if, the agency possesses that delegation and the language of the statute is found to be ambiguous on the question at issue is the reviewing court allowed to proceed to the second step of the *Chevron* inquiry, which asks "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

By conditioning step two deference on lingering statutory ambiguity that

could not be resolved at step one, "*Chevron* is not quite the 'agency deference' case that it is commonly thought to be by many of its supporters (and detractors)." *Miss. Poultry Ass'n*, 31 F.3d at 299 n.34. Rather, the *Chevron* framework recognizes that an agency's discretion to act depends entirely on a delegation of authority from Congress. Indeed, the *Chevron* Court's command that deference is due only when Congress has not spoken clearly is quite blunt: "The judiciary . . . *must* reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9 (emphasis added). And even in those instances where Congress expressly delegates authority to an agency, *Chevron* reminds us that such agency discretion is not without limit. Rather, at all times, a federal agency is required to act within the reasonable bounds of the relevant statute. *See id.* at 844-45.

II. The District Court's *Chevron* Analysis Upsets the *Chevron* Balance by Improperly Shifting Power from Congress to the Executive

A. EPA's interpretation of the Clean Water Act is not entitled to deference because Congress's intent is clearly ascertainable.

"An administrative agency may exercise only the powers granted by the statute reposing power in it." *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 211 (3d Cir. 2013). The central issue in this case—whether EPA can impose binding allocations in a TMDL—can easily be resolved at *Chevron* step one. EPA's interpretation of the CWA in this case is not entitled to deference because

even a cursory reading of the statute reveals that Congress never authorized EPA to establish various pollutant loading allocations, but merely to establish a "total maximum daily load" for each State. Nothing in the CWA authorizes EPA to allocate that total load or to otherwise determine how such a total must be achieved. Under *Chevron*'s careful balancing of congressional and executive prerogatives, EPA's claimed authority to control allocation decisions is contrary to Congress's clearly expressed intent and therefore must be rejected at step one.

Congress was not silent on the scope of EPA's authority in creating a TMDL. In crafting the CWA, Congress authorized EPA to establish a "*total* maximum daily load." 33 U.S.C. § 1313(d)(2) (emphasis added). Contrary to the district court's holding, Congress clearly defined the elements of a TMDL when it required that "*such load* shall be established at *a level* necessary to implement . . . water quality standards." 33 U.S.C. § 1313(d)(1)(C) (emphasis added). Nothing in this language even remotely authorizes EPA to impose allocations of the total load by setting hundreds of different allocations at various levels among sources throughout a watershed. Nor is there anything ambiguous about Congress's decision to singularize the terms "total," "load," or "a level" in 33 U.S.C. § 1313(d)(2). And as *Chevron* requires, this specific language must be read in harmony with other provisions in the CWA that expressly preserve state prerogatives. *See* 33 U.S.C. § 1313(d)(2), (e); *id.* § 1370.

Accordingly, application of "traditional tools of statutory construction," 467 U.S. at 843 n.9, at step one of *Chevron* unambiguously reveals that Congress empowered EPA only to establish a total load at a level necessary to meet applicable water quality standards—nothing more. In contrast, the Chesapeake Bay TMDL at issue in this case goes much further: it purports to assign pollutant limits to specific sources, would require the States to demonstrate with "reasonable assurance" how those limits will be met, and seeks to impose deadlines on the States for accomplishing the control measures. *See* JA 1355, 1360-66. But these are all matters that Congress chose to reserve to the States in the CWA, which makes States responsible for incorporating the total load into their planning processes and for deciding how best to achieve that load. *See* 33 U.S.C. § 1313(d)(2), (e). As the CWA emphasizes, unless "expressly provided" by Congress, nothing in the statute shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to [their] waters." *Id.* § 1370. And Congress further declared its policy to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b).

Under *Chevron* step one, then, EPA's attempt to insert source limits, reasonable assurance requirements, and deadlines into the Chesapeake Bay TMDL must be rejected as *ultra vires* because the CWA plainly does not authorize them.

"Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004). In this case, Congress has spoken with clarity, and "that is the end of the matter" and both the EPA and this court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.[4]

B. By creating ambiguity out of the absence of a statutory prohibition, the district court misapplied the *Chevron* framework and aggrandized EPA's authority at the expense of Congress.

The district court's perfunctory step one analysis undermines the carefully calibrated framework of *Chevron* by transferring authority from Congress to the EPA, deferring to that agency's pronouncements without engaging in the rigorous statutory analysis required to determine whether Congress intended such a shift of authority in the first place. In finding the CWA insufficiently clear on the scope of EPA's authority regarding TMDLs, the district court seized ***on the absence of an express prohibition*** of EPA's actions as a basis for proceeding to *Chevron* step two and upholding those actions. *See* JA 50 ("There is nothing in these sections that explicitly prohibits defining a TMDL as the sum of WLAs and LAs."); JA 51

[4] *Amici* agree with Appellants that, even if Congress's grant of TMDL authority were somehow ambiguous—which it is not—EPA's sweeping interpretation of its TMDL authority is not based on a permissible construction of the statute and thus fails *Chevron* step two.

("[T]here is no dispute that Congress was silent as to the precise variables attributable to a TMDL, defining a TMDL only as the load necessary 'to implement the applicable water quality standards.'") (quoting 33 U.S.C. § 1313(d)(1)(C)). That flawed analysis undermines the respect for separation of powers that animates *Chevron* and should be reversed.

"To suggest . . . that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power . . ., is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent." *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (emphasis in original). Contrary to the district court's view, Congress was not silent on the scope of EPA's power in establishing a TMDL. And *Chevron* does not permit EPA to derive the authority to impose TMDL allocations from the mere absence of an express prohibition. *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995) ("[W]e will not presume a delegation of power based solely on the fact that there is not an express withholding of power."). "Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Ethyl Corp.*, 51 F.3d at 1060.

This court has consistently rejected similar attempts to create ambiguity where none exists. In *Prestol Espinal v. Atty. Gen. of the United States*, 653 F.3d

213, 220 (3rd Cir. 2011), the court rejected the government's attempt to "manufacture[] an ambiguity from Congress'[s] failure to specifically foreclose each exception that could possibly be conjured or imagined." That approach, the court held, "would create an 'ambiguity' in almost all statutes, necessitating deference to nearly all agency determinations." *Id.*; *see also United States v. Geiser*, 527 F.3d 288 (3rd. Cir. 2008). As the Supreme Court has recognized, such "statutory silence, when viewed in context, is best interpreted as *limiting* agency discretion." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) (emphasis added).

As drafters of legislation, Congressional *amici* are deeply concerned that, if the district court's approach to *Chevron* deference is upheld by this court, it will frequently prove impossible for Congress to write statutes with sufficient clarity to pass muster under step one. When crafting statutes, Congress should not be required to anticipate, by way of an express prohibition, every conceivable extra-statutory exercise of power dreamed up by an agency. Because the CWA plainly does not authorize EPA "allocations," but only a "total" load, the court's inquiry should have ended there. *See Contreras-Bocanegra v. Holder*, 678 F.3d 811, 818 (10th Cir. 2012) ("*Chevron* does not require Congress to explicitly delineate everything an agency cannot do before we may conclude that Congress has directly spoken to the issue."); *Texas v. U.S.*, 497 F.3d 491, 502 (5th Cir. 2007) ("It stands

to reason that when Congress has made an explicit delegation of authority to an agency, Congress did not intend to delegate additional authority *sub silentio*."); *Sierra Club v. EPA*, 311 F.3d 853, 861 (7th Cir. 2002) ("It is not the EPA's prerogative to disregard statutory limitations on its discretion because it concludes that other remedies it has created out of whole cloth are better.")

By permitting regulatory agencies to essentially rewrite federal law, the holding below permits Executive Branch power to grow unchecked. Congress's ability to cabin administrative power by drafting legislation is one of its chief means of keeping Executive Branch power in check. By failing to respect that means by reading statutory grants of power too broadly, the district court's ruling invites further administrative abuses of power. Because Congress as an institution moves slowly and deliberately, Congress relies substantially on the federal courts to ensure respect for the proper boundaries of federal statutes. Otherwise, the aggrandizement of agency power will accumulate steadily, and the constitutional scheme of checks and balances could be rendered a dead letter.

The district court's failure to engage in a proper statutory analysis at step one, combined with its attempt to conjure up ambiguity where none exists, resulted in a radical transfer of power from Congress to the EPA—that is, from an accountable governmental actor to an unaccountable one. If affirmed, the district court's *Chevron* analysis will set a dangerous precedent that will only further

aggrandize federal administrative agencies at Congress's expense. To help restore the careful balance crafted by *Chevron*, this court should reverse.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the judgment below.

Respectfully submitted,

/s/ Richard A. Samp
Cory L. Andrews
Richard A. Samp
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., N.W.
Washington, DC 20036
(202) 588-0302

Counsel for Amici Curiae

COMBINED CERTIFICATIONS

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,929 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced serif typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.

3. Pursuant to Local Rule 46.1, Richard A. Samp is a member in good standing of the bar for the United States Court of Appeals for the Third Circuit.

4. The text of the electronically filed brief is identical to the text in the paper copies.

5. A virus detection program (VIPRE Business, Version 5.0.4464) has scanned the electronic file and no virus was detected.

Dated: June 20, 2014

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I hereby certify that on June 20, 2014, the foregoing *amicus curiae* brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. To the best of my knowledge, all parties to this case are represented by counsel who are registered CM/ECF users and who will be served electronically by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp